

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JACQUELINE D. MILLER,)	
)	No. CV-08-191-CI
Plaintiff,)	
)	
v.)	ORDER GRANTING DEFENDANT'S
)	MOTION FOR SUMMARY JUDGMENT
MICHAEL J. ASTRUE,)	AND DENYING PLAINTIFF'S
Commissioner of Social)	MOTION FOR SUMMARY JUDGMENT
Security,)	
)	
Defendant.)	
)	
)	

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 13, 15.) Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney David R. Johnson represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment and **GRANTS** Defendant's Motion for Summary Judgment.

JURISDICTION

Plaintiff Jacqueline D. Miller (Plaintiff) filed for social security income (SSI) on June 19, 2006. (Tr. 9.) Plaintiff alleged an onset date of November 11, 1996. (Tr. 156.) Benefits were denied initially and on reconsideration. (Tr. 118, 124.) Plaintiff requested a hearing before an administrative law judge (ALJ), which was held before ALJ Paul Gaughen on September 6, 2007. (Tr. 49-84.) Plaintiff was represented by counsel and testified at the hearing.

1 (Tr. 55-74.) Vocational expert Daniel McKinney and Plaintiff's
2 husband Timothy Miller also testified. (Tr. 74-82.) The ALJ denied
3 benefits (Tr. 9-19) and the Appeals Council denied review. (Tr. 2.)
4 The instant matter is before this court pursuant to 42 U.S.C. §
5 405(g).

6 **STATEMENT OF FACTS**

7 The facts of the case are set forth in the administrative hearing
8 transcripts and will, therefore, only be summarized here.

9 At the time of the hearing, Plaintiff was 41 years old. (Tr.
10 55.) She graduated from high school and attended college for a year
11 and half. (Tr. 56.) She also has some training as a dental
12 assistant, but did not obtain a certificate. (Tr. 75.) Plaintiff
13 received SSI benefits from 1999 to 2001. She testified benefits were
14 terminated because her spouse made too much money. (Tr. 57.)
15 Plaintiff previously worked as a bus aide, cook helper, sandwich
16 maker, and grocery bagger. (Tr. 74-75.) She was last employed as a
17 caregiver in 2003, but testified she stopped working after four months
18 because the work was too hard on her hands and knees. (Tr. 58.)

19 Plaintiff testified she has the following medical problems:
20 memory problems (Tr. 61), migraines (Tr. 61), fibromyalgia (Tr. 62),
21 asthma (Tr. 63), chest pain (Tr. 64), acid reflux (Tr. 64), irritable
22 bowel syndrome (Tr. 65), and carpal tunnel syndrome. (Tr. 66.) She
23 testified her migraines last all day and no medication helps. (Tr.
24 62.) She alleges she has pain throughout her entire body due to
25 fibromyalgia, including pain and soreness in her neck, shoulders,
26 back, hips, and knees. (Tr. 62-63.) Plaintiff testified her chest
27 pain occurs four or five times per week and lasts anywhere between
28 five minutes to all day. (Tr. 64.) She testified irritable bowel

1 syndrome causes her to have diarrhea on average three days per week
2 for five to ten minutes every hour. (Tr. 65-66.) Plaintiff said she
3 was diagnosed with carpal tunnel while in prison in 2005. (Tr. 66.)
4 She testified she can write for five or ten minutes, then has to stop
5 because her hand and arm start throbbing. (Tr. 66.) Based on all of
6 her medical problems combined, Plaintiff testified she can sit in a
7 chair for five or ten minutes, stand for five minutes, walk about a
8 half a block, cannot bend over, lift no more than five to seven pounds
9 and is very, very slow at climbing stairs. (Tr. 66-68.)

10 Plaintiff also testified she suffers from depression and anxiety.
11 (Tr. 68.) She has anxiety attacks lasting a couple of hours two times
12 per week on average. (Tr. 69.) She alleged the anxiety attacks cause
13 her to have chest pains to the point she cannot breath. (Tr. 69.)

14 STANDARD OF REVIEW

15 Congress has provided a limited scope of judicial review of a
16 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold the
17 Commissioner's decision, made through an ALJ, when the determination
18 is not based on legal error and is supported by substantial evidence.
19 See *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985); *Tackett v.*
20 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). "The [Commissioner's]
21 determination that a plaintiff is not disabled will be upheld if the
22 findings of fact are supported by substantial evidence." *Delgado v.*
23 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)).
24 Substantial evidence is more than a mere scintilla, *Sorenson v.*
25 *Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less than a
26 preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir.
27 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
28 573, 576 (9th Cir. 1988). Substantial evidence "means such evidence

1 as a reasonable mind might accept as adequate to support a
2 conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
3 (citations omitted). "[S]uch inferences and conclusions as the
4 [Commissioner] may reasonably draw from the evidence" will also be
5 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On
6 review, the court considers the record as a whole, not just the
7 evidence supporting the decision of the Commissioner. *Weetman v.*
8 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v. Harris*,
9 648 F.2d 525, 526 (9th Cir. 1980)).

10 It is the role of the trier of fact, not this court, to resolve
11 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
12 supports more than one rational interpretation, the court may not
13 substitute its judgment for that of the Commissioner. *Tackett*, 180
14 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
15 Nevertheless, a decision supported by substantial evidence will still
16 be set aside if the proper legal standards were not applied in
17 weighing the evidence and making the decision. *Browner v. Sec'y of*
18 *Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). Thus,
19 if there is substantial evidence to support the administrative
20 findings, or if there is conflicting evidence that will support a
21 finding of either disability or nondisability, the finding of the
22 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
23 1230 (9th Cir. 1987).

24 SEQUENTIAL PROCESS

25 The Social Security Act (the "Act") defines "disability" as the
26 "inability to engage in any substantial gainful activity by reason of
27 any medically determinable physical or mental impairment which can be
28 expected to result in death or which has lasted or can be expected to

1 last for a continuous period of not less than twelve months." 42
2 U.S.C. §§ 423 (d)(1)(A), 1382c (a)(3)(A). The Act also provides that
3 a Plaintiff shall be determined to be under a disability only if his
4 impairments are of such severity that Plaintiff is not only unable to
5 do his previous work but cannot, considering Plaintiff's age,
6 education and work experiences, engage in any other substantial
7 gainful work which exists in the national economy. 42 U.S.C. §§
8 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability
9 consists of both medical and vocational components. *Edlund v.*
10 *Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

11 The Commissioner has established a five-step sequential
12 evaluation process for determining whether a claimant is disabled. 20
13 C.F.R. §§ 404.1520, 416.920. Step one determines if he or she is
14 engaged in substantial gainful activities. If the claimant is engaged
15 in substantial gainful activities, benefits are denied. 20 C.F.R. §§
16 404.1520(a)(4)(I), 416.920(a)(4)(I).

17 If the claimant is not engaged in substantial gainful activities,
18 the decision maker proceeds to step two and determines whether the
19 claimant has a medically severe impairment or combination of
20 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If
21 the claimant does not have a severe impairment or combination of
22 impairments, the disability claim is denied.

23 If the impairment is severe, the evaluation proceeds to the third
24 step, which compares the claimant's impairment with a number of listed
25 impairments acknowledged by the Commissioner to be so severe as to
26 preclude substantial gainful activity. 20 C.F.R. §§
27 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404, Subpt. P, App.
28 1. If the impairment meets or equals one of the listed impairments,

1 the claimant is conclusively presumed to be disabled.

2 If the impairment is not one conclusively presumed to be
3 disabling, the evaluation proceeds to the fourth step, which
4 determines whether the impairment prevents the claimant from
5 performing work he or she has performed in the past. If plaintiff is
6 able to perform his or her previous work, the claimant is not
7 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
8 this step, the claimant's residual functional capacity ("RFC")
9 assessment is considered.

10 If the claimant cannot perform this work, the fifth and final
11 step in the process determines whether the claimant is able to perform
12 other work in the national economy in view of his or her residual
13 functional capacity and age, education and past work experience. 20
14 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482
15 U.S. 137 (1987).

16 The initial burden of proof rests upon the claimant to establish
17 a *prima facie* case of entitlement to disability benefits. *Rhinehart*
18 *v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v. Apfel*, 172 F.3d
19 1111, 1113 (9th Cir. 1999). The initial burden is met once the
20 claimant establishes that a physical or mental impairment prevents him
21 from engaging in his or her previous occupation. The burden then
22 shifts, at step five, to the Commissioner to show that (1) the
23 claimant can perform other substantial gainful activity, and (2) a
24 "significant number of jobs exist in the national economy" which the
25 claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir.
26 1984).

27 ALJ'S FINDINGS

28 At step one of the sequential evaluation process, the ALJ found

1 Plaintiff has not engaged in substantial gainful activity at any time
2 since June 19, 2006, the date of application for SSI.¹ (Tr. 11.) At
3 step two, he found Plaintiff has the following severe impairments:
4 obesity; history of valvular heart disease not otherwise specified;
5 chronic pain syndrome, diffuse, not otherwise specified, without
6 capacity of documentation with laboratory or other findings;
7 adjustment disorder with mixed anxiety and depressed mood, mild; and
8 personality disorder, not otherwise specified, with dependent,
9 avoidant, and antisocial features. (Tr. 11.) The ALJ found
10 Plaintiff's other alleged impairments are not severe: migraine
11 headaches, carpal tunnel syndrome, irritable bowel syndrome, reflux
12 and asthma. (Tr. 11.) At step three, the ALJ found Plaintiff does
13 not have an impairment or combination of impairments that meets or
14 medically equals one of the listed impairments in 20 C.F.R. Part 404,
15 Subpt. P, App. 1. (Tr. 11.) The ALJ then determined:

16 [C]laimant has the residual functional capacity to perform
17 light work. The claimant can lift 20 pounds occasionally
18 and frequently lift or carry 10 pounds. The claimant can
19 sit for six hours and stand or walk for six hours in an
20 eight-hour workday. The claimant's ability to push or pull
21 is unlimited other than by lifting or carrying restrictions.
22 She can occasionally balance, stoop, kneel, crouch, crawl,
23 and climb. The claimant has no limitations in fingering,
24 handling, or feeling. The claimant cannot lawfully be in a
25 work setting where children are left alone. She can have
26 minimal social contact with coworkers and/or the general
27 public. The claimant may have difficulty in responding
28 appropriately to criticism by a supervisor regarding her
work performance, but she would not leave her job due to
said criticism.

(Tr. 13.) At step four, the ALJ found Plaintiff is unable to perform

¹Although Plaintiff alleged an onset date of November 11, 1996,
onset for SSI is established as of the date of filing and no
retroactive benefits are available. S.S.R. 83-20.

1 any past relevant work. (Tr. 18.) After considering the testimony of
2 a vocational expert and Plaintiff's age, education, work experience,
3 and residual functional capacity, jobs were found to exist in
4 significant numbers in the national economy that Plaintiff can
5 perform. (Tr. 18.) Thus, the ALJ concluded Plaintiff has not been
6 under a disability as defined in the Social Security Act since June
7 19, 2006, the date the application was filed. (Tr. 19.)

8 ISSUES

9 The question is whether the ALJ's decision is supported by
10 substantial evidence and free of legal error. Specifically, Plaintiff
11 asserts the ALJ erred by: (1) failing to include all of Plaintiff's
12 mental limitations in the hypothetical posed to the vocational expert
13 (Ct. Rec. 14 at 14); and (2) failing to adequately support the
14 credibility determination. (Ct. Rec. 14 at 17.) Defendant argues the
15 ALJ: (1) correctly judged the medical evidence in determining
16 Plaintiff's psychological limitations and abilities (Ct. Rec. 16 at
17 8); and (2) correctly determined Plaintiff's credibility was
18 undermined. (Ct. Rec. 16 at 11.)

19 DISCUSSION

20 1. Residual Functional Capacity

21 Plaintiff argues the ALJ failed to acknowledge all of the
22 limitations identified by Dr. Gentile, a state reviewing psychologist,
23 in the Mental Residual Functional Capacity Assessment form dated
24 August 28, 2006.² (Ct. Rec. 14 at 14.) Dr. Gentile identified one
25

26 ²Plaintiff argues, "The ALJ did not include all of Dr. Gentile's
27 limitations in his hypothetical question to the vocational expert."
28 (Ct. Rec. 14 at 14.) Plaintiff's argument necessarily includes the

1 marked limitation in the ability to interact and relate appropriately
2 with the general public and moderate limitations in five other areas:
3 (1) the ability to work in coordination with or proximity to others
4 without being distracted by them; (2) the ability to accept
5 instructions and respond appropriately to criticism from supervisors;
6 (3) the ability to get along with coworkers or peers without
7 distracting them or exhibiting behavioral extremes; (4) the ability to
8 maintain socially appropriate behavior and to adhere to basic
9 standards of neatness and cleanliness; and (5) the ability to respond
10 appropriately to changes in the work setting. (Tr. 222-24.)

11 With respect to the moderate limitation in the ability to work in
12 coordination with or proximity to others without being distracted by
13 them, Dr. Gentile explained:

14 [Claimant] w/intact cognitive functioning in mental status
15 eval is capable of at least simple and likely more complex
16 instructions. May be distracted by others due to anxiety
17 sx's [symptoms] and antisocial personality traits.

18 (Tr. 222, 224.) Dr. Gentile explained the marked limitation in the
19 ability to interact appropriately with the general public and the
20 three moderate limitations in the area of social interaction as
21 follows:

22 [Claimant] would do best away from public and limited
23 coworker interaction. Supervision should be clear and
24 directive to avoid power struggles. May need some initial
25 hygiene standards set.

26 (Tr. 223-24.) Dr. Gentile's assessment of a moderate limitation in
27 the ability to respond appropriately to changes in the work setting

28 _____
argument that the ALJ's residual functional capacity determination
does not include all of the limitations assessed by Dr. Gentile, so
the court addresses both arguments accordingly.

1 was explained as follows:

2 More time to adjust to work changes mostly due to
3 personality issues and resistance to change rather than
cognitive issues.

4 (Tr. 223-24.) The ALJ gave significant weight to Dr. Gentile's
5 opinion. (Tr. 16-17.) The ALJ also indicated the opinions of the
6 state agency medical consultants were reflected in the residual
7 functional capacity determination. (Tr. 16.) Plaintiff argues the
8 ALJ erred because she did not include all of Dr. Gentile's limitations
9 in the hypothetical question to the vocational expert and "did not
10 state them [Plaintiff's limitations] as they were stated by Dr.
11 Gentile." (Ct. Rec. 14 at 14.)

12 The ALJ properly accommodated Plaintiff's tendency to be
13 distracted by others. (Ct. Rec. 16 at 9.) The residual functional
14 capacity determination made by the ALJ includes "minimal social
15 contact with coworkers and/or the general public." (Tr. 13.) The
16 restriction of "minimal contact with coworkers" both minimizes
17 Plaintiff's tendency to be distracted by others and addresses the
18 assessment that Plaintiff "would do best away from public and limited
19 coworker interaction."³ The ALJ need not be redundant and create two
20 restrictions where one restriction encompasses two limitations. The
21 ALJ adequately provided for Plaintiff's tendency to be distracted by
22 others by requiring minimal social contact with coworkers and the
23 public.

24 The ALJ also properly accommodated Plaintiff's difficulties with
25

26 ³This restriction also adequately takes into account Dr. Gentile's
27 marked limitation in the ability to interact appropriately with the
28 public.

1 supervisors. The residual functional capacity determination includes
2 "difficulty in responding appropriately to criticism by a supervisor
3 regarding her work performance, but she would not leave her job due to
4 said criticism." (Tr. 13.) Plaintiff's argument suggests the ALJ's
5 hypothetical given to the vocational expert fails because it did not
6 include the phrase provided by Dr. Gentile, "Supervision should be
7 clear and directive to avoid power struggles." (Ct. Rec. 14 at 13.)
8 However, as pointed out by Defendant, the vocational expert noted that
9 "in an unskilled work environment there wouldn't be a lot of
10 supervision interaction generally." (Tr. 77.) The vocational expert
11 went on to explain:

12 Based on my understanding of the hypothetical, I think
13 that the person you described would probably be able to do
14 unskilled work of sedentary and light nature. I say that
15 because I think there would be minimal interaction with
16 supervision. The job would be repetitive and simple to
17 learn and by it's [sic] nature being unskilled work.

18 (Tr. 78.) The vocational expert pointed out that jobs Plaintiff is
19 capable of doing would not by nature require a lot of supervision.
20 The tasks would be repetitive and simple to learn, not requiring
21 complex instructions or constant supervision. Thus, the limitations
22 resulting in the assessment that Plaintiff could do unskilled work of
23 a light and sedentary nature adequately address the issue of clear and
24 direct instructions from supervisors. The ALJ included the additional
25 limitation of difficulty accepting criticism from supervisors, which
26 goes beyond Dr. Gentile's note about supervision.

27 The court also concludes that Dr. Gentile's note indicating
28 Plaintiff "may need some initial hygiene standards set" is not a
limitation on Plaintiff's ability to work caused by her impairments.
(Ct. Rec. 16 at 10.) "Residual functional capacity is what an

1 individual can do despite his or her limitations." S.S.R. 96-8p; see
2 also 20 C.F.R. § 416.945(a)(1). In assessing residual functional
3 capacity, it is improper to find an individual has limitations or
4 restrictions beyond those caused by his or her medical impairment.
5 S.S.R. 96-8p. The ALJ noted that Plaintiff reported she can take care
6 of substantially all of her personal care. (Tr. 16, 160-61.) Another
7 examining physician, Dr. Rose, noted adequate hygiene, indicating that
8 Plaintiff is capable of appropriate hygiene. (Tr. 217.) Thus, it does
9 not appear her hygiene deficiencies, if any, are the result of her
10 impairments and are therefore not supported by the record.⁴ The ALJ
11 did not err by failing to include Dr. Gentile's note regarding hygiene
12 in assessing Plaintiff's residual functional capacity.

13 Lastly, the ALJ did not improperly fail to include Dr. Gentile's
14 note that Plaintiff requires "more time to adjust to work changes" in
15 the residual functional capacity finding. (Tr. 13; Ct. Rec. 14 at 13-
16 14.) The residual functional capacity determination should include
17 limitations based on the relevant evidence in the record. See S.S.R.
18 96-8p. Dr. Gentile is a reviewing physician and did not examine
19 Plaintiff. Dr. Gentile's notes reflect she reviewed Dr. Everhart's
20 psychological exam report. (Tr. 238.) The ALJ also assigned

22 ⁴As noted by the Defendant, Dr. Gentile's comment about hygiene
23 appears to be based on Dr. Everhart's notes that Plaintiff "presents
24 as somewhat disheveled in appearance" and her grooming was "fair to
25 poor with hair that appears uncombed but fairly clean." (Ct. Rec. 16
26 at 10-11; Tr. 211, 238.) However, Dr. Everhart did not suggest any
27 limitation or deficiency in Plaintiff's ability to engage in proper
28 hygiene. See also discussion of weighing of medical evidence, below.

1 significant weight to Dr. Everhart's report and noted the comments in
2 Dr. Gentile's report are consistent with Dr. Everhart's report. (Tr.
3 17.) However, Dr. Everhart's report specifically provides, "She would
4 be able to respond to changes in the workplace in an appropriate
5 fashion." (Tr. 213.) This conflicts with the finding by Dr. Gentile
6 that Plaintiff needs more time to adjust to work changes. Thus, the
7 statement by the ALJ that the two psychological reports are consistent
8 is erroneous.

9 However, the error is harmless because the ALJ's conclusion is
10 supported by the record. Errors that do not affect the ultimate
11 result are harmless. See *Parra v. Astrue*, 481 F.3d 742, 747 (9th Cir.
12 2007); *Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th Cir. 1990); *Booz v.*
13 *Sec'y of Health & Human Servs.*, 734 F.2d 1378, 1380 (9th Cir. 1984).
14 Dr. Everhart is an examining physician and Dr. Gentile is a reviewing
15 physician; therefore Dr. Everhart's report is entitled to more weight.
16 A treating or examining physician's opinion is given more weight than
17 that of a non-examining physician. *Benecke v. Barnhart*, 379 F.3d 587,
18 592 (9th Cir. 2004). If the treating or examining physician's
19 opinions are not contradicted, they can be rejected only with "clear
20 and convincing" reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
21 1996). If contradicted, the ALJ may reject the opinion if he states
22 "specific, legitimate reasons" that are supported by substantial
23 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d
24 1453, 1463 (9th Cir. 1995) (citing *Magallanes v. Bowen*, 881 F.2d 747,
25 753 (9th Cir. 1989); *Fair v. Bowen*, 885 F.2d 597, 605 (9th Cir. 1989).
26 The opinion of a non-examining physician may be accepted as
27 substantial evidence if it is supported by other evidence in the
28 record and is consistent with it. *Andrews v. Shalala*, 53 F.3d 1035,

1 1043 (9th Cir. 1995); *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir.
2 1995).

3 The opinion of a non-examining physician cannot by itself
4 constitute substantial evidence that justifies the rejection of the
5 opinion of either an examining physician or a treating physician.
6 *Lester*, 81 F.3d at 831, citing *Pitzer v. Sullivan*, 908 F.2d 502, 506
7 n.4 (9th Cir. 1990). Cases have upheld the rejection of an examining
8 or treating physician based on part on the testimony of a non-
9 examining medical advisor; but those opinions have also included
10 reasons to reject the opinions of examining and treating physicians
11 that were independent of the non-examining doctor's opinion. *Lester*,
12 81 F.3d at 831, citing *Magallanes v. Bowen*, 881 F.2d 747, 751-55 (9th
13 Cir. 1989) (reliance on laboratory test results, contrary reports from
14 examining physicians and testimony from claimant that conflicted with
15 treating physician's opinion); *Roberts v. Shalala*, 66 F.3d 179 (9th
16 Cir. 1995) (rejection of examining psychologist's functional
17 assessment which conflicted with his own written report and test
18 results). Thus, case law requires not only an opinion from the
19 consulting physician but also substantial evidence (more than a mere
20 scintilla but less than a preponderance), independent of that opinion
21 which supports the rejection of contrary conclusions by examining or
22 treating physicians. *Andrews*, 53 F.3d at 1039. Furthermore,
23 Administrative law judges are not bound by findings made by state
24 agency or other program physicians and psychologists, but they may not
25 ignore these opinions and must explain the weight given to the
26 opinions in their decisions. SSR 96-6p.

27 In this case, there is no evidence outside Dr. Gentile's report
28 supporting a finding that Plaintiff needs additional time to adjust to

1 workplace changes. The only psychological evidence reviewed by Dr.
2 Gentile was Dr. Everhart's report. Plaintiff cites no other evidence
3 in the record supporting the limitation that Plaintiff requires
4 additional time to adjust to changes at work. Thus, findings made by
5 Dr. Gentile inconsistent with Dr. Everhart's report are not supported
6 by the record. Any error made by the ALJ in asserting the two reports
7 are consistent is harmless, because the error does not change the fact
8 that Dr. Gentile's assessment of an additional limitation is
9 unsupported by the record.

10 The ALJ's residual functional capacity determination and
11 hypothetical included all of Plaintiff's limitations documented in the
12 record. The residual functional capacity assessment is the ALJ's
13 ultimate finding after considering the opinion and other evidence of
14 record. S.S.R. 96-5p. The ALJ's residual functional capacity
15 determination should be affirmed if he applied the proper legal
16 standard and the decision is supported by substantial evidence. See
17 *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005). The ALJ can
18 call a vocational expert to testify about the jobs available to a
19 claimant, given the claimant's residual functional capacity. *Tackett*
20 *v. Apfel*, 180 F.3d 1094, 1101 (9th Cir. 1999). It is proper for the
21 ALJ to limit a hypothetical to those impairments supported by the
22 record. *Osenbrook v. Apfel*, 240 F.3d 1157, 1165 (9th Cir. 2001).

23 There is no requirement that the ALJ include a rote recitation of
24 the restrictions identified by any particular source. The ALJ's
25 failure to quote Dr. Gentile's comments in the residual functional
26 capacity finding or the hypothetical to the vocational expert is not
27 error. Instead, the ALJ properly considered the evidence of record
28 and applied the appropriate legal standards in making the residual

1 functional capacity finding. Likewise, the hypothetical posed to the
2 vocational expert contained all of the limitations the ALJ found
3 credible and supported by substantial evidence in the record. See
4 *Bayliss*, 427 F.3d at 1217. Thus, the ALJ did not err.

5 **2. Credibility**

6 Plaintiff argues the ALJ failed to properly reject her symptom
7 testimony regarding her complaints of carpal tunnel syndrome. (Ct.
8 Rec. 14 at 16-17.) The ALJ found that Plaintiff's statements
9 concerning the intensity, persistence and limiting effects of her
10 symptoms are not entirely credible. (Tr. 15.) Defendant asserts the
11 ALJ provided sufficient reasons for the negative credibility finding
12 regarding all of her pain complaints, including her hand complaints.
13 (Ct. Rec. 16 at 13.)

14 In social security proceedings, the claimant must prove the
15 existence of a physical or mental impairment by providing medical
16 evidence consisting of signs, symptoms, and laboratory findings; the
17 claimant's own statement of symptoms alone will not suffice. 20
18 C.F.R. § 416.908. The effects of all symptoms must be evaluated on
19 the basis of a medically determinable impairment which can be shown to
20 be the cause of the symptoms. 20 C.F.R. § 4416.929.

21 Once medical evidence of an underlying impairment has been shown,
22 medical findings are not required to support the alleged severity of
23 the symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991).
24 If there is evidence of a medically determinable impairment likely to
25 cause an alleged symptom, the ALJ must provide specific and cogent
26 reasons for rejecting a claimant's subjective complaints. *Id.* at 346.
27 The ALJ may not discredit pain testimony merely because a claimant's
28 reported degree of pain is unsupported by objective medical findings.

1 *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989). The following
2 factors may also be considered: (1) the claimant's reputation for
3 truthfulness; (2) inconsistencies in the claimant's testimony or
4 between his testimony and his conduct; (3) claimant's daily living
5 activities; (4) claimant's work record; and (5) testimony from
6 physicians or third parties concerning the nature, severity, and
7 effect of claimant's condition. *Thomas v. Barnhart*, 278 F.3d 947, 958
8 (9th Cir. 2002).

9 If the ALJ finds that the claimant's testimony as to the severity
10 of her pain and impairments is unreliable, the ALJ must make a
11 credibility determination with findings sufficiently specific to
12 permit the court to conclude that the ALJ did not arbitrarily
13 discredit claimant's testimony. *Morgan v. Apfel*, 169 F.3d 599, 601-02
14 (9th Cir. 1999). In the absence of affirmative evidence of
15 malingering, the ALJ's reasons must be "clear and convincing."
16 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1038-39 (9th Cir. 2007);
17 *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001); *Morgan*, 169
18 F.3d at 599. The ALJ "must specifically identify the testimony she or
19 he finds not to be credible and must explain what evidence undermines
20 the testimony." *Holohan v. Massanari*, 246 F.3d 1195, 1208 (9th Cir.
21 2001)(citation omitted).

22 The ALJ identified a number of reasons Plaintiff's complaints of
23 pain were not entirely believable. First, the ALJ noted that
24 Plaintiff alleged she was prescribed braces for her wrist, ankle and
25 knee while incarcerated (Tr. 165), yet there is no evidence of such
26 prescription. (Tr. 15.) However, treatment notes dated December 28,
27 2005, reference "also needs wrist splint for L [left] wrist due to CTS
28 [carpal tunnel syndrome]," and notes dated January 26, 2006 state,

1 "Here to get HSR for knee brace." (Tr. 330, 341.) Thus, the ALJ
2 erred in asserting there was no evidence that Plaintiff was prescribed
3 braces while incarcerated. This error is harmless, however, because
4 the ALJ provided other clear and convincing reasons justifying the
5 negative credibility finding. See *Carmickle v. Comm'r, Soc. Sec.*
6 *Admin.*, 533 F.3d 1155, 1162-63 (9th Cir. 2008); *Batson v. Comm'r, Soc.*
7 *Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004); *Curry v. Sullivan*,
8 925 F.2d 1127, 1131 (9th Cir. 1990); *Booz v. Sec'y of Health & Human*
9 *Servs.*, 734 F.2d 1378, 1380 (9th Cir. 1984).

10 The ALJ pointed out that in August 2006, Plaintiff was not using
11 any assistive device and her gait was normal. (Tr. 15, 217.) The ALJ
12 also noted Plaintiff has not sought treatment from any specialist for
13 any of her physical conditions. (Tr. 15.) Medical treatment
14 received to relieve pain or other symptoms is a relevant factor in
15 evaluating pain testimony. 20 C.F.R. §§ 416.929(c)(3)(iv) and
16 416.929.(c)(3)(v). The ALJ is permitted to consider the claimant's
17 lack of treatment in making a credibility determination. *Burch v.*
18 *Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005); see also *Fair v. Bowen*,
19 885 F.2d 597, 604 (9th Cir. 1989). If Plaintiff has not been referred
20 to or requested the assistance of specialists for treatment, and if
21 treatment of her symptoms has been mild despite her allegations of
22 substantial and disabling pain, it is reasonable to infer that her
23 pain testimony might be overstated. Therefore, the ALJ properly
24 considered Plaintiff's lack of assistive devices and medical treatment
25 in assessing Plaintiff's credibility.

26 The ALJ noted secondary gain issues. (Tr. 16.) Plaintiff
27 admitted she could put forth more effort to find work, but she had no
28 desire or motivation to work. (Tr. 16, 304, 349.) The ALJ pointed

1 out the results of Plaintiff's psychological tests were invalid and
2 suggested a possible attempt to exaggerate her symptoms.⁵ (Tr. 16,
3 362.) An ALJ may engage in ordinary techniques of credibility
4 evaluation, including observation of inconsistencies in the claimant's
5 testimony, *Burch*, 400 F.3d at 681, and may make reasonable inferences
6 from the evidence. *Batson v. Comm'r of Soc. Sec'y Admin.*, 359 F.3d
7 1190, 1193 (9th Cir. 2004). It was reasonable for the ALJ to conclude
8 from Plaintiff's own statements about her lack of desire to work that
9 she might not be credible regarding her symptoms. Thus, the ALJ
10 reasonably considered Plaintiff's comments regarding her motivation to
11 work and the results of psychological testing in considering her
12 credibility.

13 The ALJ also concluded Plaintiff's description of daily
14 activities which are not as limited as would be expected given the
15

16 ⁵Dr. Haroian noted invalid test results on the MMPI-2, MCMI-II and
17 TSI indicate a tendency to overreport psychopathology in an attempt to
18 appear more disturbed than she is or as a cry for help because she is
19 unable to cope with current life stresses. (Tr. 362.) He also
20 indicated the results of the PAI, while valid, should be interpreted
21 with caution because the validity scale scores suggest some
22 inconsistency in responses perhaps due to carelessness, confusion,
23 attempts at impression management and possibly an exaggeration of
24 complaints and problems. (Tr. 362.) If the ALJ erred in overstating
25 the conclusions drawn from the test results, the error is harmless as
26 he cited other clear and convincing reasons for the credibility
27 finding. See *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155,
28 1162-63 (9th Cir. 2008).

1 complaints of disabling symptoms and limitations. (Tr. 16.)
2 Plaintiff reported being able to take care of almost all of her
3 personal care, grocery shopping, sharing household chores, and cooking
4 from scratch. (Tr. 16, 160-61.) Plaintiff is able to drive, although
5 she usually takes the bus. (Tr. 16, 70.) Plaintiff also admitted she
6 can follow instructions. (Tr. 16, 164.) Despite Plaintiff's
7 allegations of anxiety attacks lasting up to two hours, the ALJ
8 pointed out Plaintiff is able to be in public setting such as grocery
9 and clothing stores and uses public transportation without having
10 panic attacks. (Tr. 16, 70, 162.) Additionally, Plaintiff was able
11 to attend college classes without reports of anxiety problems. (Tr.
12 16, 75-76.) She discontinued college classes for reasons other than
13 her alleged impairments. (Tr. 75.) She also worked for about four
14 months since the alleged date of onset, although she alleged the work
15 was too hard on her knees and hands. (Tr. 16, 58.) The ALJ concluded
16 Plaintiff's work and schooling after the alleged date of onset have at
17 times been substantial. (Tr. 16.) Activities inconsistent with
18 disability complaints are a relevant factor in the credibility
19 determination. *Burch*, 400 F.3d at 680; *Thomas v. Barnhart*, 278 F.3d
20 947, 958 (9th Cir. 2002); *Morgan v. Apfel*, 169 F.3d 595, 600 (9th Cir.
21 1999). The ALJ reasonably considered Plaintiff's reported daily
22 living, school and work activities in making the credibility
23 determination. The inconsistencies between Plaintiff's activities and
24 her reports of disabling pain were reasonable evidence of her lack of
25 credibility.

26 The ALJ also cited the lack of objective evidence of Plaintiff's
27 complaints as part of the credibility analysis. (Tr. 15.) Although
28 lack of medical evidence cannot be the sole factor in a negative

credibility finding, it is a factor properly considered by the ALJ. *Burch*, 400 F.3d at 680. The ALJ pointed out treatment notes contain mostly subjective complaints with very little objective evidence. (Tr. 15.) It was noted in July 2004 that Plaintiff has no joint swelling and in August 2006 that Plaintiff had no neurological problems. (Tr. 15, 191, 217.) October 2005 notes reflect Plaintiff had a normal knee exam by a physical therapist and an image of the knee revealed no abnormalities. (Tr. 15, 315, 386.) There is no evidence of cardiovascular instability. (Tr. 15, 192, 203, 218.) The ALJ also found there is no objective evidence of carpal tunnel syndrome diagnosis.⁶ (Tr. 11.) The ALJ reasonably considered the lack of objective evidence of Plaintiff's alleged conditions when assessing her credibility.

The ALJ considered a number of proper factors in making the credibility determination, including Plaintiff's lack of assistive devices and medical treatment, statements about her lack of motivation to work, activities of daily living and other activities inconsistent with the degree of alleged pain, and the lack of objective evidence.

⁶Plaintiff did not challenge this finding or cite evidence to the contrary. Only after medical evidence showing signs, symptoms, and laboratory findings of a condition is produced must the ALJ provide clear and convincing evidence that a claimant's pain testimony regarding that condition is not believable. 20 C.F.R. § 416.908; *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991). The ALJ did not err by not specifically addressing the complaints of carpal tunnel syndrome because Plaintiff did not provide objective evidence of the condition.

1 These factors are properly considered by an ALJ when making a
2 credibility finding. "Where, as here, the ALJ has made specific
3 findings justifying a decision to disbelieve an allegation of excess
4 pain, and those findings are supported by substantial evidence in the
5 record, our role is not to second-guess that decision." *Fair*, 885
6 F.2d at 604. Thus, the ALJ did not err with respect to the
7 credibility determination.

8 **CONCLUSION**

9 Having reviewed the record and the ALJ's findings, this court
10 concludes the ALJ's decision is supported by substantial evidence and
11 is not based on error. Accordingly,

12 **IT IS ORDERED:**

13 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 15**) is
14 **GRANTED.**

15 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
16 **DENIED.**

17 The District Court Executive is directed to file this Order and
18 provide a copy to counsel for Plaintiff and Defendant. Judgment shall
19 be entered for Defendant and the file shall be **CLOSED.**

20 DATED May 29, 2009.

21
22 S/ CYNTHIA IMBROGNO
23 UNITED STATES MAGISTRATE JUDGE
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